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Rape Shield Statute

People v. Patterson, 2014 IL 115102 (No. 115102, 10/17/14)

The Illinois rape shield statute precludes evidence of a complainant's sexual history except under two narrow exceptions for: (1) evidence of past sexual conduct between the complainant and the defendant; and (2) evidence that is constitutionally required to be admitted. 725 ILCS 5/115-7.

In defendant's trial for aggravated criminal sexual assault, complainant testified that defendant forced her to have vaginal intercourse, while defendant claimed there had been no intercourse. The treating physician, a State's witness, testified that complainant had some cervical redness consistent with sexual intercourse.

Defendant attempted to introduce evidence that sperm (which did not belong to defendant) was found in complainant's vagina to show that she had engaged in sexual intercourse with someone other than defendant in the days prior to the assault. Defendant argued that although such evidence would normally be barred by the rape shield statute, he had a constitutional right to introduce such evidence to refute the inference that complainant had recent sexual intercourse with defendant by presenting evidence that she had intercourse with someone else within 72 hours, which was about the amount of time, defense counsel asserted, that sperm lasts in the vagina.

The court held that defendant failed to provide an adequate offer of proof to create an appealable issue. To preserve an appellate claim concerning the denial of a request to admit evidence, a party is required to make a detailed and specific offer of proof if the record would otherwise be unclear.

The sole support for the proffered evidence was counsel's speculation that complainant's cervical inflammation occurred three days before the alleged assault because sperm could persist for 72 hours. Counsel offered no medical testimony to support his bare assertion about the longevity of sperm or about the general persistence of cervical inflamation.

The court rejected defendant's reliance on medical sources cited in the State's appellate brief indicating cervical inflammation can last three days. It was trial counsel's burden to provide a sufficiently detailed offer of proof at trial, not months or years later on appeal. When evaluating an evidentiary ruling for abuse of discretion, the reviewing court must evaluate that discretion in light of evidence actually before the trial judge.

Since defendant did not provide a sufficient offer of proof, his claim was not subject to appellate review.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

People v. Cerda, 2014 IL App (1st) 120484 (No. 1-12-0484, 3/7/14)

1. In sex offense prosecutions, the Rape Shield Statute bars the admission of evidence about the prior sexual activity or reputation of the victim. There are two exceptions to this bar: (1) when consent is an issue and defendant seeks to introduce prior sexual activity between himself and the victim; or (2) when such evidence is constitutionally required to be admitted. 725 ILCS 5/115-7(a). If one of the exceptions applies, the court must still determine whether the evidence is relevant and the probative value outweighs the danger of unfair prejudice. 725 ILCS 5/115-7(b).

Since consent was not an issue in this case, defendant argued that the second exception applied, and that he was denied his constitutional right to present a defense where the court barred evidence that the victim's initial outcry occurred shortly after she informed her mother about her first sexual experience with a boy her own age. Defendant argued that this evidence showed that the victim had a motive to fabricate her accusations against him.

2. The State argued that the trial court properly barred the evidence since defendant failed to make an adequate offer of proof. The Rape Shield Statute provides that no evidence covered by the statute is admissible unless defendant makes an offer of proof at an *in camera* hearing. The purpose of the hearing is to determine whether defendant has evidence to impeach the witness if she denies prior sexual activity with defendant. 725 ILCS 5/115-7(b).

The court held that the hearing's purpose only applies to the first exception, and thus the statute is ambiguous as to whether it requires an offer of proof when the second exception is at issue. Beyond the statutory requirement, however, when a trial court bars evidence, no appealable issue exists in the absence of an offer of proof. The purpose of an offer of proof is to: (1) disclose the evidence to the trial court so that it may take appropriate action; and (2) provide the appellate court with an adequate record to determine whether there was error. By failing to make an adequate offer of proof, a defendant forfeits any claims on appeal that the trial court barred him from presenting evidence necessary to prove his case.

3. Here, defense counsel made an offer of proof by reading from a police report stating that the victim "told her mom days before about having had sex for the first time with a boy her own age." The court held that this offer of proof provided no evidence that the victim's mother was angry about the consensual sexual experience and defendant only argued "weakly" that the mother "could have been" angry. As a result, the offer of proof did not support defendant's proposed argument that the victim's accusations were motivated by a desire to deflect her mother's anger about the sexual encounter. The trial court thus did not abuse its discretion in excluding the evidence.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

People v. Freeman, 404 Ill.App.3d 978, 936 N.E.2d 1110 (1st Dist. 2010)

The rape shield statute, 725 ILCS 115-7, prohibits admission of evidence of the prior sexual activity or reputation of the victim of a sexual assault with two limited exceptions. Its purpose is to prevent harassment and abuse of sexual assault victims where their sexual history is irrelevant to whether they consented to sexual contact with the accused.

The statement of an alleged victim of a sexual assault to an ER physician that she had not had sex before did not defeat the purpose of the rape shield statute. It was properly admitted as an exception to the hearsay rule as a statement made by a sexual assault victim to medical personnel for the purpose of diagnosis and treatment. 725 ILCS 5/115-13.

(Defendant was represented by Assistant Defender Brian McNeil, Chicago.)

People v. Maxwell, 2011 IL App (4th) 100434 (No. 4-10-0434, 12/6/11)

Prior sexual activity of an alleged victim of a sex offense is admissible if constitutionally required. 725 ILCS 5/115-7(a). Both the due-process clause of the Fourteenth Amendment and the confrontation clauses of the state and federal constitutions guarantee the defendant a meaningful opportunity to present a complete defense. Fairness, however, does not require admission of evidence that is only marginally relevant or poses an undue risk of harassment, prejudice, or confusion of the issues.

Prior sexual activity by the alleged victim is admissible to explain the alleged victim's physical condition consistent with sexual penetration, such as damage to the hymen. If the alternative explanation is sexual intercourse with a third party, defendant must be able to implicate a specific third party. Defendant has no right to present evidence in support of the unenlightening truism that it is always possible, theoretically, that some unknown third party is responsible.

Subsection (b) of the rape-shield statute requires a specific offer of proof prior to the admission of evidence of the alleged victim's prior sexual activity with the defendant. 725 ILCS 5/115-7(b). While subsection (b) is not directly applicable where defendant denies ever having sexual intercourse with the alleged victim and does not claim consent, it is applicable by analogy where defendant seeks to present evidence of sexual activity with a third party. It makes sense to require an offer of proof of comparable rigor to admit evidence of sexual activity between the alleged victim and a third party "because the mere theoretical possibility that the alleged victim had sex with someone else has little probative value compared to the danger of humiliating the alleged victim by calling into question his or her chastity—a tactic the rape-shield statute is intended to prevent."

Because the defense had no evidence implicating a specific third party, no error occurred when the court prohibited the defense from cross-examining the State's medical expert on whether the physical evidence of sexual penetration could have resulted from intercourse with someone other than the defendant.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

People v. Patterson, 2012 IL App (1st) 101573 (No. 1-10-1573, modified op. 9/26/12)

The Illinois Rape Shield law (725 ILCS 5/115-7(a)) bars evidence of the prior sexual history of an alleged sexual assault victim unless: (1) the evidence concerns the alleged victim's prior consensual conduct with the defendant and is offered to show consent, or (2) the constitution requires that the evidence be admitted. Due process requires that evidence of the victim's sexual history be admitted where such evidence is relevant to a critical aspect of the defense. Thus, evidence of the alleged victim's sexual history is admissible to explain physical evidence such as semen, pregnancy, or physical indications of intercourse.

At defendant's trial for aggravated criminal sexual assault, a doctor who examined the complainant after the alleged offense testified that the redness of her cervix indicated that she had recently had intercourse. The prosecution used the doctor's statement to support the inference that defendant had forcible intercourse with the complainant. The trial court held that the rape shield law prevented the defense from showing that the complainant had sexual intercourse with her boyfriend a few days before the alleged offense and that a vaginal swab contained the boyfriend's DNA.

The Appellate Court concluded that such evidence should have been admitted because it supplied a plausible alternative source of the State's physical evidence and as a matter of due process qualified for the constitutional exception provision to the rape shield statute. Thus, if on retrial the State attempts to introduce evidence of the complainant's physical condition to show that she had intercourse within a day or two of the medical examination, the

defense must be permitted to introduce evidence that she had intercourse with her boyfriend and that his semen remained in her vagina at the time of the examination.

The State argued that the due process right to admit the complainant's sexual history to explain the physical evidence applies only if the complainant is a minor. The court rejected this argument, stating that "[w]henever the State seeks to use physical evidence of intercourse to support the inference that the alleged victim had intercourse with the defendant, the court must permit the defendant to introduce evidence of the alleged victim's sexual history insofar as that history could provide a plausible alternative explanation for the physical evidence."

Defendant's conviction for aggravated criminal sexual assault was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

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§46-1(c)
Miscellaneous

People v. Atherton, 406 Ill.App.3d 598, 940 N.E.2d 775 (2d Dist. 2010)

In prosecutions for illegal sexual acts, testimony by experts relating to any recognized and accepted form of post-traumatic sex syndrome is admissible. 725 ILCS 5/115-7.2. This section is broad enough to include child-sexual-abuse-accommodation-syndrome testimony under the general label of post-traumatic stress syndrome, even though it is not recognized by the Diagnostic and Statistical Manual of Mental Health III (DMS-III).

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Johnson, 406 Ill.App.3d 805, 941 N.E.2d 242 (1st Dist. 2010)

1. Generally, evidence of other crimes is inadmissible if offered merely to prove a defendant's propensity to commit crime. Under 725 ILCS 5/115-7.3(c), however, certain uncharged sex-related offenses may be admitted to show the criminal propensity of a defendant who is charged with a sex offense. Before admitting evidence under §7.3, the trial court must determine whether the probative value of the evidence is substantially outweighed by any undue prejudice in light of the proximity in time of the charged and uncharged offenses, the degree of factual similarity, and any other relevant facts.

In weighing the probative value and prejudicial effect of other crimes evidence, the key is to avoid admitting evidence which persuades the jury to convict merely because it believes the defendant is a bad person who deserves punishment. In addition, other crimes evidence is improper if it will become a focal point of the trial. Finally, other crimes evidence must have a threshold similarity to the crime charged in order to be admitted; the probative value of evidence is greater where there are more factual similarities between the offenses.

2. For two reasons, the trial court erred at a trial for aggravated criminal sexual assault when it admitted evidence that 18 months after the charged offense, defendant and another man sexually assaulted a different complainant. First, the trial court considered only whether the other crimes evidence was probative, and did not weigh the probative value against any undue prejudice. Second, there were substantial dissimilarities between the offenses. In the charged offense, the complainant was accosted by a single man as she walked past an alley. In the uncharged offense, the complainant was forced into a car and assaulted by two men who blew cocaine in her face and gave her alcohol. In addition, the type of penetration differed

between the cases.

In view of the "significant dissimilarities" between the offenses, the court concluded that the probative value of the uncharged offense was substantially outweighed by the prejudicial effect. Thus, the trial court abused its discretion by admitting the evidence.

3. However, the error was harmless because it did not likely influence the jury's verdict. The court concluded that a rational trier of fact could easily have convicted defendant based on the complainant's testimony identifying him, the properly admitted medical evidence, and an expert opinion based on DNA analysis.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

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§46-2
Criminal Sexual Assault and Abuse Offenses

§46-2(a)
Generally

People v. Giraud, 2012 IL 113116 (No. 113116, 11/29/12)

Defendant was convicted of aggravated criminal sexual assault under 720 ILCS 5/12-14(a)(3), which defines the offense as committing criminal sexual assault where "during . . . the commission of the offense" the defendant "acted in such a manner as to threaten or endanger the life of the victim." Defendant was found guilty of having unprotected forcible intercourse while knowing that he was HIV positive. The Appellate Court reduced the conviction to criminal sexual assault, finding that exposing a sexual assault victim to the possibility of contracting the HIV virus in the future is not threatening or endangering his or her life "during . . . the commission of the offense."

1. The Supreme Court affirmed the Appellate Court's holding, finding that the legislature intended for the aggravating factor of threatening or endangering the life of the victim to apply only if the threat or endangerment occurred during the offense. The court noted that nine of the 10 aggravating factors in §12-14(a) apply only during the commission of the crime, and that when the legislature intended to extend the time in which an aggravating factor could occur, it did so explicitly for the remaining factor (§12-14(a)(7)). Thus, a threat or endangerment that does not occur during the commission of the crime "cannot, as a matter of law, be used to elevate the crime from criminal sexual assault to aggravated criminal sexual assault."

2. The court noted that the State's interpretation of §12-14(a)(3) would have unintended consequences because communicable diseases other than HIV could come within the statute, the victim's HIV status before the offense would become relevant and cause the defense to seek discovery of the victim's medical history, and issues of fact would arise concerning whether a condom was used and was an adequate defense against transmission of the HIV virus.

The court also noted that the legislature enacted a two-tier scheme of punishment under which an HIV-positive person who has forced sexual intercourse may be convicted of: (1) aggravated criminal sexual assault under §12-14(a)(2) (infliction of bodily harm) if the victim develops HIV, or (2) criminal sexual assault and criminal transmission of HIV if the victim does not contract the HIV virus. In the latter case, the sentences for criminal sexual assault and criminal transmission of HIV must be served consecutively. (730 ILCS 5/5-8-4).

Because the plain language of §12-14(a)(3) requires that the threat or endangerment to the life of the victim must occur during the commission of the offense, mere exposure to the possibility of contracting the HIV virus at some later date does not constitute aggravated criminal sexual assault. The cause was remanded for sentencing for criminal sexual assault, with instructions that the sentence for criminal transmission of HIV must be served consecutively to defendant's sentences for criminal sexual assault.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

People v. Lloyd, 2013 IL 113510 (No. 113510, 4/18/13)

720 ILCS 5/12-13(a) provides that the offense of criminal sexual assault is committed where the defendant commits an act of sexual penetration: (1) by the use of force or threat of force, (2) where the accused knew that the victim was unable to understand the nature of or give knowing consent to the act, (3) with a victim who was under the age of 18 when the act was committed and the accused was a family member, or (4) with a victim who is at least 13 but under 18 when the act was committed and the accused was at least 17 and held a position of trust, authority or supervision in relation to the victim.

In this case, defendant was charged under the second alternative. Thus, the State was required to prove that defendant committed an act of sexual penetration with knowledge that the complainant was unable to either understand the nature of the act or give knowing consent. The State's theory was that defendant knew the victim was under the age of legal consent, and therefore incapable of understanding the act or giving knowing consent.

The court rejected the argument that the victim's age, standing alone, showed that she could not understand the nature of the act or give knowing consent. The court concluded that to establish criminal sexual assault under §12-13(a)(2), the State is required to show that the defendant's knew of some fact other than the victim's age which prevented her from understanding the nature of the act or knowingly consenting.

1. Illinois has adopted a scheme of sex offenses based on the ages of the victim and the perpetrator and the type of sexual conduct which occurred. Accepting the State's argument would render superfluous other portions of that scheme, including other subsections of §12-13(a), because the mere fact of defendant's knowledge that the victim was a minor would in every case be sufficient for a conviction of criminal sexual assault.

The court stressed that the proper inquiry in a prosecution under §12-13(a)(2) concerns the defendant's knowledge that a specific victim is incapable of appreciating or consenting to the act, and must be resolved on the particular facts of the case. This determination cannot be made solely on the victim's age, because all minors are deemed incapable of giving consent.

The court also noted that other than the Appellate Court's decision here, there has not been a single reported case in which a prosecution under §12-13(a)(2) was based solely on evidence of the defendant's knowledge that the victim was a minor. Instead, previous prosecutions have involved victims who were unable to understand the nature of the act or give knowing consent because they were mentally disabled, intoxicated, unconscious, or asleep.

The court also criticized the State's theory because it might require minors to answer questions at trial about their motivation or willingness to engage in sexual activity with the accused and concerning their sex education and knowledge. In addition, the State's theory would cause "havoc" with the statutory scheme of sex offenses because it would allow a 17-year-old who had intercourse with her 16-year-old boyfriend to be prosecuted for a Class 1 felony although the legislature has defined such behavior as a Class A misdemeanor.

2. The court concluded that the record was completely devoid of any evidence to support a finding that defendant knew the victim was unable to understand the nature of the acts or

give knowing consent. Although the State presented evidence from which a rational trier of fact could have concluded that defendant committed aggravated criminal sexual abuse, it chose not to charge that offense. In the course of its opinion, the court stated that in evaluating a defendant's challenge to the sufficiency of the evidence "we can only consider the evidence regarding the actual charges the State chose to bring against him, and not the fact that he may be guilty of [an] uncharged offense . . ." that is not a lesser included crime. In addition, because aggravated criminal sexual abuse contains an element which is not part of criminal sexual assault, the court could not reduce the convictions.

Defendant's seven convictions for criminal sexual assault were reversed.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Brown, 2013 IL App (2d) 110303 (No. 2-11-0303, 2/11/13)

Defendant was charged with involuntary manslaughter and aggravated criminal sexual assault predicated on causing bodily harm while committing a sexual assault with knowledge that the decedent "could not give consent." 720 ILCS 5/12-13(a)(2). Defendant contended that the evidence was insufficient to convict because there was no evidence that the decedent was unable to give knowing consent or that he was aware she was unable to give knowing consent.

In the course of affirming the conviction, the court noted that 720 ILCS 5/12-13(a)(2) is generally used in situations alleging that sexual assault victims were mentally disabled, asleep, unconscious, drugged, or intoxicated. The court found, however, that the State is not precluded from applying §12-13(a)(2) where, by inflicting a severe beating that resulted in the decedent's death, defendant rendered the decedent unable to give knowing consent, and defendant was aware that she could not consent. "[J]ust as the incapacitating effects of drugs or alcohol can rob a victim of his or her ability to give knowing consent, so could the effect of [a] physical beating."

The court also concluded that the evidence was sufficient to prove guilt, and affirmed the conviction for aggravated criminal sexual assault.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Childs, 407 Ill.App.3d 1123, 948 N.E.2d 105 (4th Dist. 2011)

Aggravated criminal sexual assault is committed when one commits criminal sexual assault and one of the statutorily-delineated aggravating circumstances exists during the commission of the offense, including that the accused caused bodily harm. 720 ILCS 5/12-14(a)(2). Because the statutory offense of aggravated criminal sexual assault does not prescribe a mental state, the mental state of intent, knowledge, or recklessness is implied. If during the course of the sexual assault, the defendant caused bodily harm to the victim, the State need not prove that such harm was inflicted knowingly or intentionally to convict defendant of aggravated criminal sexual assault. An inadvertent or accidental infliction of simple bodily harm is sufficient.

The court correctly convicted defendant of attempt aggravated criminal sexual assault where the State proved that defendant intended to commit a sexual assault and inflicted bodily harm on the victim. Even if the State were required to prove that defendant intended to inflict bodily harm, it satisfied this burden where defendant punched complainant repeatedly until she acquiesced to his sexual demands.

(Defendant was represented by Assistant Defender Larry Bapst, Springfield.)

People v. Decaluwe, 405 Ill.App.3d 256, 938 N.E.2d 181 (1st Dist. 2010)

An attempt to commit an offense requires completion of a substantial step toward the

commission of the offense with the requisite intent. An attempt aggravated criminal sexual assault requires that defendant take a substantial step toward an act of sexual penetration.

The State failed to prove the offense of attempt aggravated criminal sexual assault where it proved only that the defendant admitted that he wanted the 14-year-old complainant to take naked photos of him and to have sex with him, but had only given the complainant a camera and asked him to take defendant's photo. While defendant's admissions proved that he possessed the requisite intent, he had taken no substantial step toward an act of penetration where he had not disrobed, asked the complainant to disrobe, or communicated to complainant that he wanted to have sex with him.

(Defendant was represented by Assistant Defender Robert Markfield, Chicago.)

People v. Feller, 2012 IL App (3d) 110164 (No. 3-11-0164, 10/25/12)

Defendant was convicted of counts of criminal sexual assault and aggravated criminal sexual assault that required the State to prove that defendant held a position of trust, authority or supervision over the complainant. "Supervise" means "superintend" or "oversee." There is no requirement in the statute that the position of trust, authority or supervision be of any specific duration.

The State's evidence was sufficient to prove that element. The defendant sexually assaulted the complainant while they were swimming in a lake. The complainant: (1) was 14 years old and legally blind; (2) could not swim in a lake unassisted and would not swim with someone she did not trust; (3) was assisted by defendant while they both swam in the lake; and (4) would not have been able to swim without defendant's assistance. Defendant oversaw the complainant's progress as she swam from the shore into the lake. Common sense dictates that an individual who guides a blind person into an unknown body of water is in a position of trust with that person.

Lytton, J., dissented. The statutory reference to a position of trust, authority or supervision does not apply to actions based on the momentary assistance defendant offered the complainant in swimming with her to the shore. Complainant was not acquainted with defendant before that day and could not have held him in a position of trust.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

People v. Giraud, 2011 IL App (1st) 091261 (No. 1-09-1261, 8/30/11)

1. A person commits the offense of criminal sexual assault by committing an act of sexual penetration by use of force or threat of force. A person commits aggravated criminal sexual assault by committing criminal sexual assault where an aggravating factor is present during the assault.

Defendant was convicted of aggravated criminal sexual assault under 720 ILCS 5/12-14(a)(3), which creates an aggravating factor where the defendant acts "in such a manner as to threaten or endanger the life of the victim or any other person." The court concluded that under Illinois law, a criminal sexual assault is elevated to aggravated criminal sexual assault only if the aggravating circumstance occurs "during . . . the commission of the" criminal sexual assault. Thus, the aggravating factor must occur contemporaneously with the criminal sexual assault.

Defendant, who was HIV-positive, was convicted of aggravated criminal sexual assault for exposing his daughter to HIV by forcing her to engage in unprotected sex. The court concluded that merely exposing the victim of a criminal sexual assault to HIV, without more, does not constitute the §12-14(a)(3) aggravating factor, because there is no immediate risk to the victim's life during the commission of the criminal sexual assault. "In other words, while

exposing someone to HIV can result in transmitting . . . a life-threatening disease to that person, it cannot threaten or endanger someone's life *during* the commission of the criminal sexual assault."

2. The court noted that defendant was also convicted of criminal transmission of HIV, which is a separate offense defined as committing criminal sexual assault while exposing the victim to HIV, without actually causing the victim to contract HIV. "The fact that the legislature criminalized the act of exposing one to HIV, combined with the fact that sentence for such crime is to run consecutive to sexual assault convictions, shows that the legislature intended HIV exposure its own separate crime, and not . . . an aggravating factor to elevate criminal sexual assault to aggravated criminal sexual assault."

3. In the course of its opinion, the court noted that had the daughter actually contracted HIV, defendant could have been charged with aggravated criminal sexual assault under §12-14(a)(2), which elevates criminal sexual assault to aggravated criminal sexual assault if the defendant causes bodily harm to the victim. The court also noted that other jurisdictions have considered an HIV-infected person's sexual organs and bodily fluids to be "deadly weapons," and have sustained convictions of aggravated criminal sexual assault based on displaying a deadly weapon during the course of a criminal sexual assault. Here, however, the State did not charge defendant under §12-14(a)(1), the equivalent provision under Illinois law.

Because the evidence was sufficient to prove that defendant committed criminal sexual assault, the conviction for aggravated criminal sexual assault was reduced to criminal sexual assault and the cause remanded for resentencing. The court also noted that because 730 ILCS 5/5-8-4(a) requires that the sentence for criminal transmission of HIV run consecutively to the underlying criminal sexual assault conviction, the trial court improperly ordered defendant's sentences to be served concurrently.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

People v. Gomez, 2011 IL App (1st) 092185 (No. 1-09-2185, 9/30/11)

Under the ongoing-criminal-assault rule, Illinois does not require proof of a living victim of a sexual assault where the assault and another offense are committed as a part of the same criminal episode, and the State proves the elements of both offenses.

The State proved that defendant forced his way into the victim's home, threatened her with a BB gun and a knife, pushed her down, stabbed her through the neck with the knife, and then sexually assaulted her. The State was not required to proved that she was still alive when the actual penetration occurred essentially simultaneously with the homicide and as part of the same criminal episode.

(Defendant was represented by Assistant Defender Geoffrey Burkhart, Chicago.)

People v. Gutierrez, 402 Ill.App.3d 866, 932 N.E.2d 139 (1st Dist. 2010)

Defendant was convicted of first degree murder and aggravated criminal sexual assault. He contended on appeal that the aggravated criminal sexual assault conviction must be reversed because the State failed to prove that the decedent was alive at the time of the assault.

1. Illinois follows the "ongoing criminal assault" rule, under which a conviction for sexual assault is proper so long as the forcible compulsion which lead to the sexual assault began before the victim's death. Because it was clear that the decedent was alive when defendant instituted the force which resulted in both the sexual assault and the murder, the aggravated criminal assault conviction was proper even if the victim was killed before the sexual assault occurred.

2. In the alternative, the court held that the evidence was sufficient to prove beyond a reasonable doubt that the victim's death occurred after the sexual assault was completed.

Defendant's convictions and sentences were affirmed.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

People v. Lloyd, 2011 IL App (4th) 100094 (No. 4-10-0094, 11/16/11)

Defendant was charged with seven counts of criminal sexual assault under 720 ILCS 5/12-13(a)(2), which defines the offense as committing an act of "sexual penetration" where "the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent." The complaining witness was 13 the time of the alleged offenses. The State did not argue that the complainant was unable to understand the nature of the acts, but claimed that §12-13(a)(2) applied because under Illinois law, a 13-year-old is "unable to give knowing consent." In most cases, the age to consent in Illinois is 17, although in a few instances it is 18.

1. The majority concluded that §12-13(a)(2) is broad enough to include acts committed against a person who is legally unable to consent because of her age. The court acknowledged that in other sections of the Criminal Code the legislature specifically criminalized sexual acts committed against persons who are under the age of consent. The court concluded, however, that the legislature did not intend to exclude such acts from prosecution under §12-13(a)(2).

The court also noted that unlike statutes outlawing sexual activity based on age, in a prosecution under §12-13(a)(2) the State must prove not only the complainant's age but also that the defendant knew the complainant could not legally consent. "[B]ecause the State has to prove the accused knew the victim was unable to consent, it would be highly unlikely any sexual contact between two similarly aged teenagers under 17 or sex with a person almost 17 would be punishable under section 12-13(a)(2)."

The court found that the evidence showed that the defendant knew the complainant's age and that she could not legally consent to sexual activity. Therefore, defendant was properly convicted under §12-13(a)(2).

2. In dissent, Justice Steigmann found that §12-13(a)(2) was intended, and has been traditionally interpreted, to apply in two instances: (1) where the victim is unable to understand the act, and (2) where due to her mental condition the victim is unable to give consent. Justice Steigmann rejected the argument that §12-13(a)(2) applies where the victim is unable to give consent merely because she is under the age of consent. Those crimes are prosecuted under other statutes which provide varying penalties; §12-13(a)(2) authorizes a non-probationable Class 1 felony conviction, while aggravated criminal sexual abuse based on the complainant's age is a probationable Class 2 felony.

The dissent expressed concern that under the majority's reasoning, a 17-year-old male who engages in sexual penetration with a girlfriend who is one month under the age of 17 can be convicted under §12-13(a)(2) of a non-probationable Class 1 felony. Justice Steigmann rejected the majority's view that such prosecutions would be rare because the State would be required to prove that the defendant knew the victim was unable to consent; the construction of a criminal statute "should not be based upon the hope that no prosecutor will ever bring ridiculous charges."

The dissent concluded that the evidence clearly showed that the defendant committed an offense which the State did not charge - aggravated criminal sexual abuse. However, the record did not support criminal sexual assault, the offense which the State chose to prosecute.

Justice Steigmann added:

> In my 22-years on this court, I have never written an opinion to

> reverse a criminal conviction based on the insufficiency of the State's evidence. Nor have I written a dissent, as this one, arguing that the majority has erred by failing to reverse a defendant's conviction on the grounds of insufficient evidence. This long-standing record is in no small measure due to my deference to the trier of fact and my unwillingness to second-guess it.
>
> This case is different. Here, we need not reweigh the evidence because there is no evidence to weigh. Once the State's claim is rejected – that based solely on [the complainant's] age, she was unable to understand the nature of the act or unable to give knowing consent – this record is bereft of any evidence to sustain defendant's convictions.

3. For purposes of the criminal sexual assault statute, 720 ILCS 5/12-12(f) defines "sexual penetration" as involving two broad categories of conduct. The first category includes any contact "between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person." Within this category, the term "object" does not include parts of the defendant's body, including fingers. The second category includes any "intrusion of any part of the body of one person . . . into the sex organ or anus of another person."

Defendant was convicted of criminal sexual assault for acts of "sexual penetration" involving his fingers and the complainant's vagina. At the State's request and without objection by the defense, the trial court gave the jury only the portion of IPI Crim. 4th, No. 11.65E concerning the first category - "contact" between the complainant's sex organ by "an object, the sex organ, mouth or anus of" the defendant.

The court concluded that concerning three of the four convictions, failing to give the proper definition of "sexual penetration" did not constitute plain error. For each of the three convictions, the complainant's testimony clearly demonstrated that defendant inserted his fingers into her vaginal opening. Because the uncontroverted evidence showed digital penetration, the result of the trial on those convictions would not have been different had the proper instruction been given.

Concerning the other conviction, however, the complainant's testimony did not clearly show penetration by the defendant's fingers. Based on the evidence, the jury could have found that no penetration occurred. Concerning this count, therefore, plain error occurred because the incorrect definitional instruction could have affected the outcome of the trial.

Defendant's criminal sexual assault conviction for Count I was reversed, but the other three convictions were affirmed.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Mims, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2010) (No. 1-08-2460, 8/20/10)

At a trial for aggravated criminal sexual assault, trial counsel was not ineffective although he failed to request a jury instruction concerning a consent defense. In the course of its opinion, the court rejected the argument that without an instruction on consent, the jury had no basis on which it could have acquitted.

Because aggravated criminal sexual assault is defined as an act of sexual penetration by use of force or threat of force, and a consensual act is not perpetrated by force, the jury could have acquitted had it believed that defendant's actions were consensual.

People v. McNeal, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2010) (No. 1-08-2264, 9/30/10), superceded by 405 Ill.App.3d 647, 955 N.E.2d 32

Sexual penetration involving the sex organ of one person by the sex organ of another requires evidence of contact, however slight. Sexual penetration involving the sex organ of one person and any part of the body of another requires proof an intrusion, however slight. 720 ILCS 5/12-12(f).

Instructing the jury that sexual penetration involving a body part requires only contact, not an intrusion, was error, but not plain error, given that the evidence was not closely balanced or the error so fundamental as to affect the fairness of the trial.

The dissent (Gordon, R., J.) would reverse defendant's aggravated criminal sexual assault conviction based on evidence that defendant forced complainant to insert her finger in her vagina. The statutory definition of penetration requires that the body part of one person intrude into the sex organ of another. Insertion of complainant's finger into her vagina did not meet that definition.

Alternatively, the dissent would find plain error based on the erroneous penetration instruction. Complainant, a non-native English speaker, testified that she put her finger in her own vagina. Defendant's statements to the police were only that he told her to touch herself or touch her clitoris. Therefore the evidence on this issue was closely balanced and the issue should be noticed as plain error.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Ostrowski, 394 Ill.App.3d 82, 914 N.E.2d 558 (2d Dist. 2009)

The offense of criminal sexual abuse occurs where a defendant commits an act of "sexual conduct" by use of force or threat of force. Aggravated criminal sexual abuse occurs where the victim of the "sexual conduct" is under the age of 18 and the accused is a family member.

"Sexual conduct" is defined as any "intentional or knowing touching or fondling by the victim or the accused, either directly or though clothing, of the sex organs, anus, or breasts of the victim or the accused, or any part of the body of a child under 13 years of age, . . . for the purpose of sexual gratification or arousal of the victim or the accused."

1. Factors used to determine whether conduct is "sexual" in nature include: (1) whether the conduct was intended to arouse or satisfy the sexual desires of the defendant or victim; (2) the relationship between the defendant and the victim; (3) whether anyone else was present; (4) the length and purpose of the contact; (5) whether there was a legitimate, non-sexual purpose for the contact; (6) when and where the contact occurred; and (7) the conduct of the defendant and the victim before and after the contact.

2. Here, the evidence was insufficient for a rational jury to conclude that kisses on the lips between a grandfather and his five-year-old granddaughter were for the purpose of sexual gratification or arousal. The court noted that the granddaughter and grandfather appeared to be engaging in horseplay at a public festival, and that neither appeared to be upset until police intervened. In addition, the recollections of the prosecution witnesses contained substantial contradictions concerning the types of kisses that were being exchanged and the positions of both the defendant and the granddaughter. "While defendant's public display of intoxication while supervising his granddaughter was inappropriate, his conduct was not proven beyond a reasonable doubt to constitute aggravated criminal sexual abuse."

(Defendant was represented by Panel Attorney James Leven, Chicago.)

People v. Raymond, 404 Ill.App.3d 1028, 938 N.E.2d 131 (1st Dist. 2010)

Relying on **People v. Douglas**, 381 Ill.App.3d 1067, 886 N.E.2d 1232 (2d Dist. 2008), the court concluded that a mistake-of-age defense was not available to a defendant charged with predatory criminal sexual assault of a child. The State was required to prove a mental state for the element of penetration, but not for the circumstance of the age of the defendant and the victim.

(Defendant was represented by Assistant Defender Sean Southern, Chicago.)

People v. Roldan, 2015 IL App (1st) 131962 (No. 1-13-1962, 9/14/15)

Defendant was charged with criminal sexual assault based on the allegation that he knew the victim was "unable to understand the nature of the act or [was] unable to give knowing consent." (720 ILCS 5/11-1.20(a)(2)). The trial court concluded that defendant knew or should have known that the victim was in a "blackout" state and was unable to give knowing consent.

The Appellate Court concluded that even viewing the evidence most favorably to the prosecution, the record was devoid of any credible evidence to support a finding that at the time of the encounter between defendant and the victim, defendant knew or should have known that the victim was unable to give knowing consent. There was evidence showing that the victim consumed a large quantity of alcohol on the night in question, and at one point was difficult to awaken and had to be led to a wheelchair because she had trouble walking. This evidence of unresponsiveness concerned a time period well after the victim's encounter with defendant, however.

The evidence showed that at the time of the encounter between defendant and the victim, the latter stated several times that she wanted to have sex with defendant. Although defendant initially declined and said "she would regret it in the morning because she was drunk," the couple eventually engaged in intercourse after the victim continued to say that she wanted to have sex with defendant. Defendant then returned to his home and the victim went back to the party where they had met. It was later in the evening when the victim was unresponsive and unable to walk.

In addition, the State did not introduce a toxicology report concerning the victim, and there was no evidence that the victim was in a "blackout" state at the time of her activities with defendant. Although the victim testified that she "blacked out" and could not remember the encounter with defendant, there was also evidence that she walked back to the party unassisted and did not appear to other partygoers to be impaired. The Appellate Court concluded that under these circumstances, there was a lack of evidence to indicate that defendant knew the victim was unable to consent to sexual activity with the defendant, even if she might have been unable to consent later in the evening.

The conviction for criminal sexual assault was reversed.

People v. Toy, 407 Ill.App.3d 272, 945 N.E.2d 25 (1st Dist. 2011)

Defendant was charged with aggravated criminal sexual assault in that he committed a criminal sexual assault while armed with a firearm. 720 ILCS 5/12-14(a)(8). Unless specified otherwise, "firearm" has the meaning ascribed to it by the Firearm Owners Identification Act. 720 ILCS 5/2-7.5. The FOID Act defines a firearm as "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas," excluding certain pneumatic, spring, paint ball, or BB guns, any device used for signaling or safety and required or recommended by the United States Coast Guard or Interstate Commerce Commission, any device used for firing of industrial ammunition, and antique firearms that are primarily collector's items and not likely to be used as a weapon. 430

ILCS 65/1.1.

The prosecution witnesses' testimony that they observed defendant with a gun and that defendant pressed an object against the head of the complainant and threatened to kill her while sexually assaulting her was sufficient to prove that he was armed with a firearm.

(Defendant was represented by Assistant Defender Jessica Arizo, Chicago.)

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People v. Hurry, 2012 IL App (3d) 100150 (No. 3-10-0150, modified 4/20/12)

Defendant was convicted of two counts of predatory criminal sexual assault based on the act of placing his penis in the mouth of the child. Because the child's testimony was that defendant placed her hand on his penis, the court reduced the convictions from predatory criminal sexual assault to aggravated criminal sexual abuse. 720 ILCS 5/12-16.

(Defendant was represented by Assistant Defender Glenn Sroka, Ottawa.)

People v. Hurry, 2013 IL App (3d) 100150-B (No. 3-10-0150, Mod. Op. 1/16/14)

Defendant was convicted of two counts of predatory criminal sexual assault based on the act of placing his penis in the mouth of the child. Because the child's testimony was that defendant placed her hand on his penis, the court reduced the convictions from predatory criminal sexual assault to aggravated criminal sexual abuse. 720 ILCS 5/12-16.

(Defendant was represented by Assistant Deputy Defender Verlin Meinz, Ottawa.)

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§46-4
Other Sex Related Offenses

People v. Giraud, 2011 IL App (1st) 091261 (No. 1-09-1261, 8/30/11)

1. A person commits the offense of criminal sexual assault by committing an act of sexual penetration by use of force or threat of force. A person commits aggravated criminal sexual assault by committing criminal sexual assault where an aggravating factor is present during the assault.

Defendant was convicted of aggravated criminal sexual assault under 720 ILCS 5/12-14(a)(3), which creates an aggravating factor where the defendant acts "in such a manner as to threaten or endanger the life of the victim or any other person." The court concluded that under Illinois law, a criminal sexual assault is elevated to aggravated criminal sexual assault only if the aggravating circumstance occurs "during . . . the commission of the" criminal sexual assault. Thus, the aggravating factor must occur contemporaneously with the criminal sexual assault.

Defendant, who was HIV-positive, was convicted of aggravated criminal sexual assault for exposing his daughter to HIV by forcing her to engage in unprotected sex. The court concluded that merely exposing the victim of a criminal sexual assault to HIV, without more, does not constitute the §12-14(a)(3) aggravating factor, because there is no immediate risk to the victim's life during the commission of the criminal sexual assault. "In other words, while exposing someone to HIV can result in transmitting . . . a life-threatening disease to that person, it cannot threaten or endanger someone's life *during* the commission of the criminal sexual assault."

2. The court noted that defendant was also convicted of criminal transmission of HIV, which is a separate offense defined as committing criminal sexual assault while exposing the victim to HIV, without actually causing the victim to contract HIV. "The fact that the legislature criminalized the act of exposing one to HIV, combined with the fact that sentence for such crime is to run consecutive to sexual assault convictions, shows that the legislature intended HIV exposure its own separate crime, and not . . . an aggravating factor to elevate criminal sexual assault to aggravated criminal sexual assault."

3. In the course of its opinion, the court noted that had the daughter actually contracted HIV, defendant could have been charged with aggravated criminal sexual assault under §12-14(a)(2), which elevates criminal sexual assault to aggravated criminal sexual assault if the defendant causes bodily harm to the victim. The court also noted that other jurisdictions have considered an HIV-infected person's sexual organs and bodily fluids to be "deadly weapons," and have sustained convictions of aggravated criminal sexual assault based on displaying a deadly weapon during the course of a criminal sexual assault. Here, however, the State did not charge defendant under §12-14(a)(1), the equivalent provision under Illinois law.

Because the evidence was sufficient to prove that defendant committed criminal sexual assault, the conviction for aggravated criminal sexual assault was reduced to criminal sexual assault and the cause remanded for resentencing. The court also noted that because 730 ILCS 5/5-8-4(a) requires that the sentence for criminal transmission of HIV run consecutively to the underlying criminal sexual assault conviction, the trial court improperly ordered defendant's sentences to be served concurrently.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

People v. Rexroad, 2013 IL App (4th) 110981 (No. 4-11-0981, modified 6/28/13)

1. A person of the age of 17 and upwards commits the offense of indecent solicitation of a child if the person, with the intent that the offense of aggravated criminal sexual assault, criminal sexual assault, predatory criminal sexual assault of a child, or aggravated criminal sexual abuse be committed, knowingly solicits a child or one whom he believes to be a child to perform an act of sexual penetration or sexual conduct as defined in §12-12 of the Criminal Code. 720 ILCS 5/11-6(a). Defendant was charged with indecent solicitation of a child when he sent suggestive text messages to a police officer who was pretending to be a teenaged girl.

The instructions provided to defendant's jury defining the elements of indecent solicitation of a child were defective. They failed to require the jury to find that defendant knew or believed the child was under 17 years of age, and that defendant possessed the intent to commit aggravated criminal sexual abuse. The court noted that these pattern instructions (Nos 9.01, 9.01A and 9.02) have since been modified to correctly state the law.

The Appellate Court affirmed despite the error because it had been forfeited below and did not amount to plain error where the evidence was not closely balanced and the error did not affect defendant's defense that he was not the person who sent the text messages.

2. The court rejected the argument that the State had failed to prove the *corpus delicti* of the offense of indecent solicitation of a child because the sexually-explicit messages were sent to a detective impersonating a 15-year-old girl and therefore there was no possibility of any injury to a minor. The fact that a minor was not actually victimized is irrelevant. The offense was complete when defendant knowingly solicited someone he believed to be a child to commit a variety of sexual acts, with the intent that the sexual acts be committed.

3. The court rejected defendant's argument, relying on **Ashcroft v. Free Speech Coalition**, 535 U.S. 234 (2002), that his text messages were constitutionally-protected speech because they only simulated a conversation between defendant and a minor, where defendant actually communicated with a police detective. In **Free Speech Coalition**, the Supreme Court made clear that criminal penalties for unlawful solicitation of minors may be enforced. The government may suppress speech that advocates the incitement of imminent illegal action that is likely to produce that illegal action. Defendant was convicted of encouraging imminent illegal sex acts with a minor with the intent that those lawless acts occur.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

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§46-5
Sexually Dangerous Persons Act

People v. Masterson, 2011 IL 110072 (No. 110072, 9/22/11)

1. The Equal Protection Clause requires that the government treat similarly situated individuals in a similar fashion, unless it can demonstrate an appropriate reason to treat them differently. The level of scrutiny applied to an equal protection challenge is determined by the nature of the right affected. "Strict scrutiny" analysis is applied when the challenge involves a fundamental right or suspect classification based on race or national origin. In such cases, the classification satisfies the equal protection clause if it is narrowly tailored to serve a compelling State interest.

The "rational basis" test is applied where the classification does not involve a

fundamental right or suspect classification. Under this standard, the statute survives the challenge if it bears a rational relationship to a legitimate government purpose.

Finally, "intermediate scrutiny" is applied to classifications based on gender, illegitimacy, and content-neutral incidental burdens to speech. The "intermediate scrutiny" standard requires a showing that the statute is substantially related to an important governmental interest.

As a threshold matter, equal protection analysis applies only where the individual raising the challenge can demonstrate that he is similarly situated to another group.

2. The Sexually Dangerous Persons Act provides that the trial court may appoint two psychiatrists to examine the defendant and render an opinion as to his dangerousness. The Sexually Violent Persons Act provides that in addition to any expert testimony from the Department of Corrections evaluator or Illinois Department of Human Services psychiatrist, the respondent may retain experts or professional persons to perform an examination. If the respondent is indigent, the county must pay the cost of such experts.

The court concluded that it need not determine whether equal protection is violated by the disparate provisions concerning the right to obtain additional experts, because persons charged with being sexually dangerous are not similarly situated to persons committed under the Sexually Violent Persons Act. The Sexually Violent Persons Act applies to only a limited number of criminal offenses which are deemed sexually violent, and requires a conviction for specified violent sex offenses or a trial which ends in an insanity finding. By comparison, persons are eligible for sexually dangerous status if they are charged with any criminal offense. No conviction is required for sexually dangerous status; the proceeding provides an involuntary and indefinite commitment in lieu of criminal prosecution.

The court concluded that individuals subject to commitment as sexually violent persons are a distinct and more dangerous group because they have been convicted, or tried and declared insane, of the most serious and violent types of sex offenses. Although both Acts have the goal of protecting the public from mentally disordered individuals who pose a risk of sex crime recidivism, and both may subject individuals to indefinite commitment, the Acts address separate groups of individuals. Thus, persons charged under each act are not similarly situated for equal protection purposes.

Because the two affected classes are not similarly situated, the court declined to apply any equal protection analysis.

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§46-6
Sexually Violent Persons Act

In re Detention of Hardin, 238 Ill.2d 33, 932 N.E.2d 1016 (2010)

The quantum of evidence necessary to support a petition for commitment of a sexually violent person at a probable cause hearing is less than that necessary to convict. The State need only establish a plausible account on each of the required elements of the petition to assure the court that there is a substantial basis for the petition. While the court should not ignore blatant credibility problems, it should not choose between conflicting facts or inferences.

People v. Hughes, 2012 IL 112817 (No. 112817, 11/29/12)

1. In order to render effective assistance of counsel, defense counsel must inform a

defendant who pleads guilty to a sexually violent offense that he will be evaluated for possible commitment under the Sexually Violent Person's Commitment Act.

2. The court concluded, however, that defendant failed to establish that defense counsel was ineffective. First, the record did not show that defense counsel failed to advise defendant of the possibility that a sexually violent person's petition could be filed. Second, even if counsel's performance was deficient, defendant failed to prove that prejudice resulted where he claimed only that he would not have pleaded guilty had he known that the plea would not dispose of the entire proceeding.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

People v. Masterson, 2011 IL 110072 (No. 110072, 9/22/11)

1. The Equal Protection Clause requires that the government treat similarly situated individuals in a similar fashion, unless it can demonstrate an appropriate reason to treat them differently. The level of scrutiny applied to an equal protection challenge is determined by the nature of the right affected. "Strict scrutiny" analysis is applied when the challenge involves a fundamental right or suspect classification based on race or national origin. In such cases, the classification satisfies the equal protection clause if it is narrowly tailored to serve a compelling State interest.

The "rational basis" test is applied where the classification does not involve a fundamental right or suspect classification. Under this standard, the statute survives the challenge if it bears a rational relationship to a legitimate government purpose.

Finally, "intermediate scrutiny" is applied to classifications based on gender, illegitimacy, and content-neutral incidental burdens to speech. The "intermediate scrutiny" standard requires a showing that the statute is substantially related to an important governmental interest.

As a threshold matter, equal protection analysis applies only where the individual raising the challenge can demonstrate that he is similarly situated to another group.

2. The Sexually Dangerous Persons Act provides that the trial court may appoint two psychiatrists to examine the defendant and render an opinion as to his dangerousness. The Sexually Violent Persons Act provides that in addition to any expert testimony from the Department of Corrections evaluator or Illinois Department of Human Services psychiatrist, the respondent may retain experts or professional persons to perform an examination. If the respondent is indigent, the county must pay the cost of such experts.

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The court concluded that individuals subject to commitment as sexually violent persons are a distinct and more dangerous group because they have been convicted, or tried and declared insane, of the most serious and violent types of sex offenses. Although both Acts have the goal of protecting the public from mentally disordered individuals who pose a risk of sex crime recidivism, and both may subject individuals to indefinite commitment, the Acts address separate groups of individuals. Thus, persons charged under each act are not similarly

situated for equal protection purposes.

Because the two affected classes are not similarly situated, the court declined to apply any equal protection analysis.

People v. Peterson, 404 Ill.App.3d 145, 935 N.E.2d 1123 (2d Dist. 2010)

At a fitness discharge hearing, the trial court erred by finding defendant "not not guilty," and should have entered an acquittal. Defendant was charged with knowingly failing to register a change of address as required by the Sex Offender Registration Act. (730 ILCS 150/3(a)) However, the State presented no evidence supporting that charge, and at most proved that defendant was homeless for the entire period in question.

At the discharge hearing, the State argued two theories: that defendant gave a false address when he claimed to live at an address where the resident denied any knowledge of him, and that defendant failed to comply with the weekly reporting requirement imposed on homeless persons who are subject to the Registration Act. The court found that neither theory had been proven.

First, the fact that defendant was unknown to the resident at the address which defendant gave was insufficient to prove defendant provided a false address. Given defendant's documented mental deficiencies and memory problems, it was as likely that defendant confused two apartments at that address as that he knowingly gave false information.

Second, the weekly reporting requirement applies only to persons who lack a "fixed address," which is defined as an address at which the registrant stays five days a year. Because defendant could have stayed at the second apartment at least five days a year, the State failed to prove that he lacked a "fixed address" and was thus required to report weekly.

Nor did defendant's statement to police that he was homeless establish either that he gave a false address or that he was subject to weekly reporting. To a layman, having a "fixed address" (*i.e.,* a location to stay five days a year) is not inconsistent with being "homeless."

Because the State failed to prove that defendant knowingly provided false information or was required to report weekly, the evidence was insufficient to satisfy the reasonable doubt standard. The Appellate Court entered an acquittal in defendant's behalf.

In the course of its holding, the court observed that the offense of providing false registration information requires a knowing mental state. The court rejected the argument that the legislature intended to create an absolute liability offense. (See **People v. Molnar**, 222 Ill.2d 495, 857 N.E.2d 209 (2006)).

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Steward, 406 Ill.App.3d 82, 940 N.E.2d 140 (1st Dist. 2010)

A prisoner confined in an Illinois Department of Corrections facility can be assessed court costs and fees for the filing of a frivolous post-conviction petition. 735 ILCS 5/22-105. A defendant confined to a Department of Human Services facility as a sexually violent person may not be assessed those costs and fees because he is not confined in the IDOC.

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§46-7
Sex Offender Registration Act

In re S.B., 2012 IL 112204 (No. 112204, 10/4/12)

Noting that it has authority to read into statutes language which the legislature omitted by oversight, the court elected to allow unfit juveniles who are found "not not guilty" in a discharge hearing to seek termination of the sex offender registration requirement under the same conditions as minors adjudicated delinquent for sex offenses. The court also found that the legislature made a similar oversight with respect to the limitations that are contained in the Sex Offender Community Notification Law (730 ILCS 152/121) related to the dissemination of sex offender registration information with respect to adjudicated delinquents. It held that §121 of that Act should be read to include juveniles found "not not guilty" following a discharge hearing.

People ex rel. Birkett v. Konetski et al., 233 Ill.2d 185, 909 N.E.2d 783 (2009)

1. The court granted *mandamus* to compel the trial court to vacate an order exempting a juvenile delinquent from the requirement that he register as a sex offender. The court found that the legislature intended to impose a mandatory obligation to register on juvenile sex offenders, and to require trial courts to admonish juvenile sex offenders concerning the duty to register. (See also **COLLATERAL REMEDIES**, §9-3(a)).

2. The court rejected arguments that applying the Sex Offender Registration Act to juveniles violates procedural due process. The court noted that under recent amendments to the Act, a minor's registration information is circulated to only a limited group of people. In addition, a minor may seek termination of the registration requirement after five years.

The court also rejected arguments that the Act violates the prohibition against cruel and unusual punishment and the proportionate penalties clause. Finally, the court rejected the argument that the *ex post facto* clause is violated by the post-adjudication reclassification of a juvenile delinquent who has committed the offense of criminal sexual assault as a "sexual predator."

People v. Cardona, 2013 IL 114076 (No. 114076, 3/21/13)

1. Procedural due process governs the constitutionality of procedures utilized to deny life, liberty, or property, and is generally satisfied where the citizen receives notice and an opportunity to be heard. Procedural due process is a fluid concept, however, and more or less procedural due process may be necessary depending upon the circumstances and the type of proceeding.

Substantive due process, by contrast, limits the State's ability to act irrespective of the procedural protections provided. Although defendant raised a procedural due process challenge to the requirement that he register as a sex offender, the court concluded that his argument involved substantive due process – whether a defendant who is unfit to stand trial can constitutionally be certified as a sex offender after he is found "not not guilty" in a discharge hearing that is held because he is not expected to be restored to fitness within one year. Defendant contended that even if he were afforded the full panoply of procedural rights guaranteed in a criminal trial, his unfitness to stand trial means that he is incapable of participating in any meaningful way in any proceeding at which his life, liberty, or property is at stake.

The court concluded that in light of the defendant's failure to present his argument except in procedural due process terms, it would limit its consideration to procedural due process and leave for another day resolution of any possible substantive due process claim under these circumstances.

2. Because due process is a flexible concept, the procedures required in a particular case depend on the nature of the case and the circumstances. Although the due process clause

categorically bars the criminal prosecution of a defendant who is unfit to stand trial, under **People v. Waid**, 221 Ill. 2d 464, 851 N.E.2d 1210 (2006), the State may hold a discharge hearing of an unfit defendant even when an extended period of treatment or involuntary civil commitment may result. A discharge hearing is not a criminal prosecution, but an "innocence only" hearing that is civil in nature. The court concluded that defendant was afforded an appropriate level of due process at his discharge hearing, including notice, the right to be heard, the right to present evidence, the right to assistance by counsel and by an interpreter, and application of the reasonable doubt standard.

3. In the course of its opinion, the court rejected the argument that it is fundamentally unfair to require a person who has been found "not not guilty" to register as a sex offender despite the fact that he has not been convicted of committing a triggering offense. The court noted that the category "sex offender" is created by statute and applies to several situations, including where the defendant is found "not not guilty" of a triggering offense at a discharge hearing. Because the registration statute clearly covers defendant's situation, no error occurred.

(Defendant was represented by Assistant Defender Kathleen Weck, Chicago.)

In re S.B., 408 Ill.App.3d 516, 945 N.E.2d 102 (3d Dist. 2011)

The Sex Offender Registration Act provides that a person who is charged with a sex offense, found unlikely to be fit to stand trial within one year, and not "acquitted" at a discharge hearing is required to register as a sex offender. (730 ILCS 150/2(A)(1)(d)). Section 150/2(A)(5) provides that a juvenile is required to register as a sex offender only if he is adjudicated delinquent for an act which would constitute an act which would require an adult to register. The court concluded that the plain language of the statute showed that the legislature intended that only juveniles who are adjudicated delinquent are required to register.

Thus, a juvenile who is charged with a sex offense, found unlikely to be fit to stand trial within one year, and found "not not guilty" at a discharge hearing is not required to register. The court stated that an absurd result would occur if such juveniles were required to register, because under 730 ILCS 150/3-5 they would be unable to petition the circuit court to have the sex offender registration terminated, although juveniles adjudicated delinquent can do so.

(Defendant was represented by Assistant Deputy Defender Verlin Meinz, Ottawa.)

People v. Black, 394 Ill.App.3d 935, 917 N.E.2d 114 (1st Dist. 2009)

The Sexual Offender Registration Act and the Child Murderer and Violent Offender Against Youth Registration Act require that the trial court determine whether a specified offense was sexually motivated, in order to determine whether the defendant is subject to registration as a sex offender or as a violent offender against youth. Because the trial court failed to make such a ruling, the requirement of Sex Offender Registration was vacated. The cause was remanded for determination whether the offense of unlawful restraint, which defendant committed against an 11-year-old boy, was sexually motivated.

(Defendant was represented by Assistant Defender Steven Becker, Chicago.)

People v. Black, 2012 IL App (1st) 101817 (No. 1-10-1817, 5/17/12)

1. The Sex Offender Registration Act provides that a defendant commits a sex offense that subjects him to a registration requirement when he unlawfully restrains a victim under 18 years old, and the defendant is not a parent to the victim, if the offense is "sexually motivated." 730 ILCS 150/2(A)(1)(a), (B)(1.5). An offense is "sexually motivated" when "one or

more of the facts of the underlying offense indicates conduct that is of a sexual nature or that shows an intent to engage in behavior of a sexual nature." 20 ILCS 4026/10(e).

The legislature included a sexual-motivation component to prevent individuals whose crimes have nothing to do with sex offenses from being required to register as sex offenders. If the court makes a finding that the offense was not sexually motivated, the defendant is subject to a registration requirement under the Child Murderer and Violent Offender Against Youth Registration Act. 730 ILCS 154/5(a)(1)(A), (b)(1).

A court reviews a trial court's findings that an offense was sexually motivated under the manifest-weight-of-the-evidence standard. A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based on the evidence.

2. The court's finding that defendant's unlawful restraint of an 11-year-old boy was sexually motivated was not against the manifest weight of the evidence. The court was only required to find that at least one of the facts supporting defendant's unlawful restraint conviction indicated conduct that was of a sexual nature or showed an intent to engage in such behavior. There is no requirement of actual sexual contact or an overt sexual act.

Defendant, a grown man, used sports conversation and requests for help with his groceries as a pretext to lure the boy into his apartment. The boy had to engage in a physical struggle with defendant before he was able to flee. That luring and the discovery of defendant's possession of an adult pornographic magazine shortly after the offense indicate that defendant's activities with the boy consisted of conduct of a sexual nature. Luring-type behavior has proven to be a precursor to commission of sex offenses or intent to commit sex offenses against children. The magazine was illustrative of defendant's state of mind – his preoccupation with sexual activity.

The Appellate Court observed that "there was no alternative motive clearly present from the record and, given the facts, it would have been difficult for the trial court to certify the opposite conclusion, that there was *no* indication that defendant was motivated to engage in conduct of a sexual nature."

3. The court rejected the defense argument that the Act confines consideration of "sexual motivation" to the facts of the underlying offense. Motive is not an essential element of the offense of unlawful restraint. A court could consider "only the elements of the offense at trial absent motive." The legislature did not intend that the "statute would then prohibit the State from presenting evidence at a posttrial and postsentencing proceeding that, while not necessary to prove defendant committed the crime, did tend to prove *why* he committed that crime."

Therefore, while the trial court had found that defendant's possession of a pornographic magazine was inadmissible at trial, it properly considered that evidence in determining that the offense was sexually motivated.

4. A court may also properly consider the defendant's social and criminal history as set forth in the presentence investigation report if relevant. Analyzing the facts of the underlying offense necessarily requires consideration of a defendant's background and the stimuli motivating the present conduct.

The trial court thus properly considered defendant's self-report that he was the victim of sexual abuse when he was younger and that he was physically abused because his family believed that he was a homosexual. Although defendant's mere arrests for prostitution and solicitation absent supporting evidence are not properly considered, defendant's criminal history was not a significant factor in the trial court's decision.

The Appellate Court affirmed the finding that defendant was required to register as

a sex offender.

(Defendant was represented by Assistant Defender Karl Mundt, Chicago.)

People v. Cardona, 2012 IL App (2d) 100542 (No. 2-10-0542, 3/2/12)

1. A non-acquittal of the offense of unlawful restraint of a child entered at a discharge hearing of an unfit defendant pursuant to 725 ILCS 5/104-25 requires that the defendant register as a sex offender where the court makes a finding that the offense was sexually motivated. 730 ILCS 150/2(B)(1.5). "'Sexually motivated' means one or more of the facts of the underlying the offense indicates conduct that is of a sexual nature or that shows an intent to engage in behavior of a sexual nature." 20 ILCS 4026/10(e). A finding that the offense was not sexually motivated requires that defendant register as a violent offender against youth. 730 ILCS 154/5(b)(1); 730 ILCS 154/86. A court's determination of this factual finding should be reversed only if it is against the manifest weight of the evidence.

The court's finding that the offense was sexually motivated was not against the manifest weight of the evidence nor was it precluded by defendant's acquittal of the offense of indecent solicitation of a child. As charged, a conviction of indecent solicitation of a child required a finding beyond a reasonable doubt that with the intent that the offense of predatory criminal sexual assault be committed, defendant solicited the child to perform an act of sexual penetration. The State's inability to meet this high burden did not preclude the court from finding that the lower standard—that one of more of the facts underlying the unlawful restraint indicate conduct of a sexual nature or an intent to engage in behavior of a sexual nature—had been satisfied.

The child's statement to her father and a police officer that defendant told her that he wanted to have sex with her was sufficient to support this finding. The statements were admitted as substantive evidence and were made immediately after the offense. In contrast, the child's testimony at the discharge hearing that she did not remember whether defendant mentioned sex took place two years after the offense.

2. Deprivation of a liberty interest without a meaningful opportunity to be heard violates due process. A defendant is not denied due process where a procedurally-safeguarded opportunity to contest the ruling resulting in the deprivation of liberty is afforded the defendant. Due process is a flexible concept and not all situations call for the same procedural safeguards.

Assuming that sex-offender registration implicates a liberty interest, defendant was afforded a procedurally-safeguarded opportunity at the discharge hearing to contest the ruling that required him to register as a sex offender. The question at a discharge hearing conducted pursuant to 725 ILCS 5/104-25 is whether to acquit the defendant, not whether to convict. Therefore defendant is not afforded all of the procedural protections of a criminal trial. Nonetheless the procedural protections afforded defendant were sufficient where he was provided notice and the opportunity to present objections at the discharge hearing, and had an appointed attorney who was able to cross-examine prosecution witnesses, the right against self-incrimination, and the standard of proof beyond a reasonable doubt.

(Defendant was represented by Assistant Defender Kathleen Weck, Chicago.)

People v. Cowart, 2015 IL App (1st) 131073 (No. 1-13-1073, 2/17/15)

Before accepting a guilty plea, the trial court must admonish the defendant about the direct consequences of his plea; the court does not need to admonish the defendant about collateral consequences. A direct consequence "has a definite, immediate and largely automatic effect" on defendant's punishment. Illinois courts have held that mandatory sex offender

registration is a collateral consequence, since it is neither a restraint on liberty nor a punishment.

Defendant argued that the reasoning of **Padilla v. Kentucky**, 559 U.S. 356 (2010) should be extended to require a trial court to admonish a defendant who is pleading guilty about mandatory sex offender registration. In **Padilla**, the defendant argued that his trial counsel was ineffective for failing to inform him that his guilty plea made him eligible for deportation. The United States Supreme Court held that even though deportation is a civil consequence of a guilty plea, given its enmeshment with criminal law, it could not be "categorically removed" from defense counsel's duty to provide proper advice to a client who is pleading guilty.

The Appellate Court rejected defendant's argument. It held that unlike deportation, sex offender registration is not a punishment or restraint on liberty. Registration remains a collateral consequence and thus there was no need for admonitions about it. Additionally, **Padilla** involved an issue about ineffective assistance of counsel, not trial court admonitions. Since defendant raised no claim about ineffective counsel, **Padilla** does not change the outcome.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Evans, 405 Ill.App.3d 1005, 939 N.E.2d 1014 (2d Dist. 2010)

730 ILCS 154/1 *et seq*. requires that a person over the age of 17 who commits a "violent offense against youth" must register under the Child Murder and Violent Offender Against Youth Registration Act. First degree murder is a "violent offense against youth" if the victim was under 18 and the defendant was at least 17.

A person who was over the age of 17 at the time of the offense, and who is convicted as an accomplice, is required to register under the Act even if the principal was under the age of 17 and therefore not required to register. First, the plain language of the statute contains no exception for persons convicted as accomplices. Second, although an accomplice may not be convicted if the State fails to prove that the principal committed an element of the charged offense, that rule does not apply to collateral ramifications of a criminal conviction. "For example, if an alien defendant is convicted of a crime on an accountability theory and thus is subject to deportation, he would not avoid deportation simply because the principal is a United States citizen and not subject to deportation."

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Fredericks, 2014 IL App (1st) 122122 (No. 1-12-2122, 6/26/14)

In 2012, defendant entered a guilty plea to one count of possession of methamphetamine and was sentenced to two years probation. As a result of a 1999 conviction for attempted aggravated criminal sexual abuse, the plea required defendant to register as a sex offender for life.

The trial court did not advise defendant of the lifetime registration requirement before it accepted the guilty plea on the possession offense. Defendant had completed the 10-year registration period for the 1999 conviction before the possession offense occurred.

1. In order to satisfy the due process requirement that guilty pleas must be entered knowingly and voluntarily, the trial court must inform the defendant of the direct consequences of a guilty plea before the plea is accepted. Direct consequences are those which affect the sentence and other punishment which the court may impose. However, the trial court need not advise a guilty plea defendant of collateral consequences of the plea.

The court concluded that a requirement to register as a sex offender is merely a

collateral consequence of the plea. Therefore, due process does not require that a guilty plea defendant be admonished that he will be required to register as a sex offender.

The court acknowledged that in **Padilla v. Kentucky**, 559 U.S. 356 (2010), the Supreme Court held that the Sixth Amendment right to the effective assistance of counsel requires defense counsel to advise a client of the immigration consequences of a guilty plea. The Illinois Supreme Court has extended **Padilla** to an attorney's failure to inform a client that a guilty plea can lead to involuntary commitment as a sexually violent person. **People v. Hughes**, 2012 IL 112817.

Here, however, defendant contended not that his attorney rendered ineffective assistance, but that due process was violated by the trial court's failure to provide admonishments that he would be required to register as a sex offender for the rest of his life. Whether or not counsel had a duty to advise defendant of the registration requirement, the trial court had no such duty before it could accept a guilty plea.

2. 730 ILCS 150/5-7 requires that a defendant who is to be released on probation or conditional discharge and who is subject to a sex offender registration requirement must be advised of that requirement. In addition, 730 ILCS 150/5 requires that the trial court provide written notice of the registration requirement to an offender who is to be released on probation. Although defendant was sentenced to probation on his guilty plea, the statutory notice was not provided.

The Appellate Court concluded that the failure to comply with the notice requirements of the Registration Act did not provide a basis for defendant to withdraw the plea. The purpose of §§5 & 5-7 is to prevent a defendant from inadvertently violating probation because he or she lacks knowledge of the registration requirement. The notification requirements are directory rather than mandatory, however, and do not prevent the trial court from accepting a guilty plea.

The trial court's order denying defendant's motion to withdraw his guilty plea was affirmed.

People v. Kayer, 2013 IL App (4th) 120028 (No. 4-12-0028, 5/6/13)

The Sex Offender Registration Act provides that if a sex offender "changes" his "place of employment," he shall report his "change in employment . . . within the time period specified in Section 3." 730 ILCS 150/6. Section 3 provides that the sex offender shall register in person within three days of "establishing . . . a place of employment." 730 ILCS 150/3(b).

The Appellate Court concluded that the Act does not require a sex offender to report a loss of employment. This interpretation is supported by the legislature's use of the word "change," the plain and ordinary meaning of which is "to replace with another." It is impossible for a sex offender who loses his job to report a change of his "place of employment"within the time period of §3, as that period of time begins to run only after he has established his new place of employment. The Registration Act requires a sex offender who loses his fixed place of residence to report that loss, but contains no comparable language with respect to employment. Not requiring a report of loss of employment is consistent with the purpose of the Act, which is to enable law enforcement to keep track of sex offenders. Loss of employment does not require law enforcement to track an offender at a new location.

(Defendant was represented by Assistant Defender Marty Ryan, Springfield.)

People v. Olsson, 2011 IL App (2d) 091351 (No. 2-09-1351, 9/22/11)

1. Sex offenders and sexual predators must register as provided by the Sexual Offender Registration Act. Included within the statutory definition of "sex offenders" are persons who

are the subject of a "not not guilty" finding after a discharge hearing conducted subsequent to a finding of unfitness to stand trial. 725 ILCS 5/104-25; 730 ILCS 150/2(A)(1)(d). "Sexual predators" include persons convicted of enumerated offenses, including predatory criminal sexual assault of a child and aggravated criminal sexual abuse. 730 ILCS 150/2(E). "After conviction or adjudication," sexual predators are required to register for life, while sex offenders are required to register for a period of ten years. 730 ILCS 150/7. Under the Act, "convicted" and "adjudicated" have the same meaning. 730 ILCS 150/2(A)(5).

2. A finding of "not not guilty" of the offenses of predatory criminal sexual assault of a child and aggravated criminal sexual abuse subjects the defendant to registration for ten years as a sex offender, not to lifetime registration as a sexual predator. The court rejected the State's argument that defendant qualified as a sexual predator, because under the Act, "convicted" and "adjudicated" have the same meaning, and in finding defendant "not not guilty," the court "adjudged" that defendant committed the charged offenses.

When an act defines its own terms, those terms must be construed according to the definitions given them in the act. The legislature included persons found "not not guilty" after a discharge hearing in the definition of sex offenders, but did not include such persons in the definition of sexual predators. The court refused to read into the Act what appeared to be a deliberate exclusion of unfit defendants from the category of sexual predators. The court construed §2(A)(5), which defined "adjudications" as the equivalent of "convictions," to only extend the registration requirement to juveniles found delinquent based on the commission of an enumerated offense.

3. This construction of the Act is consistent with due process. Criminal prosecution of a person unfit for trial is prohibited by the due process clause of the Fourteenth Amendment. Defendant was not adjudicated guilty at the discharge hearing. He has not yet had a definitive resolution of the charges against him. Subjecting someone who has not gained resolution of the charges against him to lifetime registration as a sexual predator could have a chilling effect on that person's exercise of his right to a discharge hearing.

The court modified the trial court's order to subject defendant to registration for a period of ten years.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Robinson, 2013 IL App (2d) 120087 (No. 2-12-0087, 8/5/13)

To prove a violation of the duty of a sex offender to report a change of address, the State must prove that defendant: (1) was previously convicted of an offense subjecting him to the Act; and (2) established a new fixed residence or temporary domicile which he knowingly failed to report in person to the law enforcement agency with whom he last registered. 730 ILCS 150/6.

A "fixed residence" is "any and all places that a sex offender resides for an aggregate period of time of 5 or more days in a calendar year." 730 ILCS 150/2(I). A defendant may have multiple fixed residences. A "temporary domicile" is "any and all places where the sex offender resides for an aggregate period of time of 3 or more days during the calendar year." 730 ILCS 150/3.

Evidence that defendant was often absent from the residence at which he registered for more than five days failed to prove that defendant stayed at one specific address for the requisite period of time. Vague evidence that defendant was at his "girlfriend's house" two nights a month was also insufficient. Without evidence of the identity of this girlfriend, the court was unwilling to assume that the reference to "his girlfriend" referred to only one person or that defendant stayed with the same person each time.

Because defendant's absence from his registered address failed to prove that he had another fixed residence or temporary domicile, the court reversed defendant's conviction for failure to report a change of address.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Velez, 2012 IL App (1st) 101325 (No. 1-10-1325, 3/22/12)

A defendant convicted of child abduction committed by luring or attempting to lure a child under the age of 16 into a motor vehicle without the consent of the parent for other than a lawful purpose is required to register as a sex offender if the trial court makes a finding that the offense was sexually motivated. 730 ILCS 150/2(B)(1.9) "'Sexually motivated'" means one or more of the facts of the underlying offense indicated conduct that is of a sexual nature or that shows an intent to engage in behavior of a sexual nature." 20 ILCS 4026/10(e).

The trial court did not err in finding that the child abduction was sexually motivated. The child testified that defendant did a "double take" and looked at her as she walked down the street. He offered her a ride home twice, even though she did not verbally respond, put up her hood, and walked faster. Defendant was a complete stranger to the 14-year-old school girl, suggestively referred to her as "baby girl," and doggedly pursued her in order to convince her to get in his van.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

People v. Wlecke, 2014 IL App (1st) 112467 (No. 1-11-2467, 2/5/14)

Section 6 of the Sex Offender Registration Act requires a convicted sex offender to either register the address of his fixed residence (defined as any place an offender lives for five or more days during a calendar year), or if he does not have a fixed address, to report weekly. 730 ILCS 150/6. The Act also requires the offender to provide accurate information. 730 ILCS 150/3(a). Defendant was convicted of failing to report weekly while lacking a fixed residence. The Appellate Court held that the State failed to prove defendant guilty beyond a reasonable doubt.

1. The absence of a fixed residence is an essential element of the offense of failing to report weekly. Here, the State failed to show that defendant did not have a fixed residence. Defendant provided the authorities with two addresses, a V.A. hospital and a residence. The State could have established its case by presenting records from the V.A. hospital or testimony from the residents of the other listed address. The State, however, failed to present any evidence that defendant did not reside at either location for five or more days, and thus failed to establish that defendant lacked a fixed residence.

2. The Court rejected the State's claim that one of the addresses, a V.A. hospital providing inpatient treatment, could not be considered a fixed residence. The only requirement for being a fixed residence is that a person reside there for five or more days during a year, and there was no reason someone could not reside at an inpatient treatment facility for five or more days.

3. The State claimed that defendant's statement that he was staying with friends showed that he lacked a fixed residence. The Court held that there was no inconsistency between staying with friends and having a fixed residence. Under the Act's definition, a person could have a fixed residence by staying with friends for five or more days during the year. In this sense, a person could have a fixed residence and yet be homeless in the ordinary meaning of the word.

4. The State also failed to prove that defendant did not comply with the conditions of reporting weekly, beginning with his failure to register. The Act requires a person who lacks

a fixed residence to register by notifying the authorities that he lacks a fixed address and identifying his last known address. Thereafter, he must report weekly. Although defendant was not registered, it was not due to any voluntary omission on his part. Instead, it was due to the officer's improper refusal to complete the registration. Defendant made a good faith effort to comply with the Act by reporting to the authorities upon his release from prison and providing them with his two addresses. The officer did not believe that defendant had valid proof of a fixed residence, but also refused to register defendant as lacking a fixed residence. If the officer had registered defendant as lacking a fixed residence, defendant would have been properly registered and in compliance with the Act when he was arrested six days later.

5. The Court rejected the State's argument that defendant failed to provide accurate information since he could not produce a valid driver's license, State identification, or other government-issued document showing his residence. The Court held that the Act's requirement for accurate information is not synonymous with or limited to the categories of identification listed by the State. The Court also noted that the State's insistence on sex offenders presenting government-issued identification is inconsistent with the reality faced by offenders who have been recently released from prison and who must register within three days of their release.

(Defendant was represented by Assistant Defender Emily Hartman, Chicago.)

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